

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JOSEPH URLACHER,

Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner of
Social Security,

Defendant.

Case No. 3:09-cv-05786-BHS-KLS

REPORT AND RECOMMENDATION

Noted for April 1, 2011

Plaintiff has brought this matter for judicial review of defendant's denial of his application for disability insurance benefits. This matter has been referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule MJR 4(a)(4) and as authorized by Mathews, Secretary of H.E.W. v. Weber, 423 U.S. 261 (1976). After reviewing the parties' briefs and the remaining record, the undersigned submits the following Report and Recommendation for the Court's review, recommending that for the reasons set forth below, defendant's decision to deny benefits be reversed and that this matter be remanded for further administrative proceedings.

FACTUAL AND PROCEDURAL HISTORY

On November 3, 2006, plaintiff filed an application for disability insurance benefits, alleging disability as of December 9, 2002, due to back and leg problems, nerve damage to his right leg, re-occurring headaches, numbness in his right hand, high blood pressure, and high cholesterol. See Tr. 8, 87, 103. His application was denied upon initial administrative review

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1 and on reconsideration. See Tr. 8, 42, 49, 51, 54. A hearing was held before an administrative
2 law judge (“ALJ”) on June 17, 2009, at which plaintiff, represented by counsel, appeared and
3 testified, as did a vocational expert. See Tr. 8, 18-39.

4 On July 15, 2009, the ALJ issued a decision in which plaintiff was determined to be not
5 disabled. See Tr. 8-17. Plaintiff’s request for review of the ALJ’s decision was denied by the
6 Appeals Council on October 20, 2009, making the ALJ’s decision defendant’s final decision. See
7 Tr. 1; see also 20 C.F.R. § 404.981. On December 21, 2009, plaintiff filed a complaint in this
8 Court seeking judicial review of defendant’s decision. See ECF #1-#3. The administrative
9 record was filed with the Court on May 3, 2010. See ECF #11. The parties have completed their
10 briefing, and thus this matter is now ripe for the Court’s review.

11 Plaintiff argues defendant’s decision should be reversed and remanded to defendant for
12 further administrative proceedings because the ALJ erred: (1) in assessing plaintiff’s credibility;
13 (2) in assessing his residual functional capacity; and (3) in finding him to be capable of
14 performing other jobs existing in significant numbers in the national economy. The undersigned
15 agrees the ALJ erred in determining plaintiff to be not disabled, but, for the reasons set forth
16 below, recommends that while the ALJ’s decision should be reversed, this matter should be
17 remanded to defendant for further administrative proceedings. Although plaintiff has requested
18 oral argument, the undersigned finds such argument to be unnecessary here.

21 DISCUSSION

22 This Court must uphold defendant’s determination that plaintiff is not disabled if the
23 proper legal standards were applied and there is substantial evidence in the record as a whole to
24 support the determination. See Hoffman v. Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986).
25 Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to
26

support a conclusion. See Richardson v. Perales, 402 U.S. 389, 401 (1971); Fife v. Heckler, 767 F.2d 1427, 1429 (9th Cir. 1985). It is more than a scintilla but less than a preponderance. See Sorenson v. Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975); Carr v. Sullivan, 772 F. Supp. 522, 524-25 (E.D. Wash. 1991). If the evidence admits of more than one rational interpretation, the Court must uphold defendant's decision. See Allen v. Heckler, 749 F.2d 577, 579 (9th Cir. 1984).

I. The ALJ's Assessment of Plaintiff's Credibility and Residual Functional Capacity

In his decision, the ALJ found plaintiff had the residual functional capacity ("RFC"):

... to perform light work as defined in 20 CFR 404.1567(b) except he could only occasionally climb ramps or stairs, stoop, knee, crouch, or crawl. He could not climb ladders, ropes or scaffolds. He could not work with extreme cold, vibrations, machinery or heights.

Tr. 14 (emphasis in original). The reasons the ALJ gave for assessing plaintiff with this residual functional capacity read in relevant part as follows:

The claimant testified that he had chronic pain that interfered with his ability to sit, stand or walk for prolonged periods. He said that he had difficulty sleeping and that he rested a couple times a day. I accept that he has chronic pain. He has undergone three lumbar surgeries and has consistently reported chronic pain. However, the evidence does not indicate that the claimant is so limited in his ability to sit, stand or walk, and his doctors have indicated that they thought he could work.

After careful consideration of the evidence, I find that the claimant's medically determinable impairments could reasonably be expected to cause the alleged symptoms; however, the claimant's statements concerning the intensity, persistence and limiting effects of these symptoms are not credible to the extent they are inconsistent with the above residual functional capacity assessment.

In terms of the claimant's alleged inability to sit, stand or walk for more than ten minutes. In November of 2004, Dr. [Arnel M.] Brion[, M.D., a treating physician,] suggested that the claimant could attend a [cooperative school work] program for 30 hours a week, suggesting that he thought that the claimant could sit long enough to participate in the program. The claimant indicated an interest in training as a nuclear medical technician, a light job that

1 would require standing and walking more than ten minutes at a time. In 2005
 2 Dr. [John M.] Blair[, M.D., also a treating physician,] indicated that the
 3 claimant could sit, stand and walk for six hours in an eight hour day and lift
 4 twenty-five pounds occasionally. The physical capacities evaluation
 5 concluded that the claimant could perform a range of light work. The
 6 claimant has participated in vocational retraining geared at training him for
 7 sedentary work, suggesting that he thought he could sit more than ten minutes.
 8 He also attended classes at the time of his date last insured,^[1] an activity that
 9 requires sitting more than ten minutes at a time. In April of 2007, Dr. [C.
 10 Stephen] Settle[, M.D., another treating physician,] indicated that the claimant
 11 was capable of light work (exhibit 7E, p.3). In March of 2007 Dr. Settle
 12 certified that the claimant could perform work as an accounting clerk (exhibit
 13 7E, p.13).

14 While there have been times since his alleged onset [date of disability]
 15 through his date last insured that doctors thought he could not work, these
 16 were relatively short periods in which his doctors felt that he would likely
 17 improve after surgery or physical therapy.

18 In sum, the above residual functional capacity assessment is supported by the
 19 findings of the State Agency physicians and not inconsistent with the
 20 recommendations of the claimant's treating physicians and the claimant's own
 21 retraining pursuits.

22 Tr. 15.

23 If a disability determination "cannot be made on the basis of medical factors alone at step
 24 three of the [sequential disability] evaluation process,"² the ALJ must identify the claimant's
 25 "functional limitations and restrictions" and assess his or her "remaining capacities for work-
 26 related activities." Social Security Ruling ("SSR") 96-8p, 1996 WL 374184 *2. A claimant's
 residual functional capacity ("RFC") assessment is used at step four to determine whether he or

¹ To be entitled to disability insurance benefits, plaintiff "must establish that [his] disability existed on or before" the date his insured status expired. ¹ Tidwell v. Apfel, 161 F.3d 599, 601 (9th Cir. 1998); see also Flaten v. Secretary of Health & Human Services, 44 F.3d 1453, 1460 (9th Cir. 1995) (social security statutory scheme requires disability to be continuously disabling from time of onset during insured status to time of application for benefits, if individual applies for benefits for current disability after expiration of insured status). In this case, plaintiff's date last insured was December 31, 2007. Tr. 10. Therefore, to be entitled to disability insurance benefits, plaintiff must establish he was disabled prior to or as of that date. Tidwell, 161 F.3d at 601.

² Defendant employs a five-step "sequential evaluation process" to determine whether a claimant is disabled. See 20 C.F.R. § 404.1520; 20 C.F.R. § 416.920. If the claimant is found disabled or not disabled at any particular step of that process, the disability determination is made at that step, and the sequential evaluation process ends. See id.

1 she can do his or her past relevant work, and at step five to determine whether he or she can do
2 other work. See id. It thus is what the claimant “can still do despite his or her limitations.” Id.

3 A claimant’s residual functional capacity is the maximum amount of work the claimant is
4 able to perform based on all of the relevant evidence in the record. See id. However, an inability
5 to work must result from the claimant’s “physical or mental impairment(s).” Id. Thus, the ALJ
6 must consider only those limitations and restrictions “attributable to medically determinable
7 impairments.” Id. In assessing a claimant’s RFC, the ALJ also is required to discuss why the
8 claimant’s “symptom-related functional limitations and restrictions can or cannot reasonably be
9 accepted as consistent with the medical or other evidence.” Id. at *7.

11 Questions concerning a claimant’s credibility are solely within the control of the ALJ.
12 See Sample v. Schweiker, 694 F.2d 639, 642 (9th Cir. 1982). The Court should not “second-
13 guess” this credibility determination. Allen, 749 F.2d at 580. In addition, the Court may not
14 reverse a credibility determination where that determination is based on contradictory or
15 ambiguous evidence. See id. at 579. That some of the reasons for discrediting a claimant’s
16 testimony should properly be discounted does not render the ALJ’s determination invalid, as
17 long as that determination is supported by substantial evidence. Tonapetyan v. Halter, 242 F.3d
18 1144, 1148 (9th Cir. 2001).

20 To reject a claimant’s subjective complaints, the ALJ must provide “specific, cogent
21 reasons for the disbelief.” Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1996) (citation omitted).
22 The ALJ “must identify what testimony is not credible and what evidence undermines the
23 claimant’s complaints.” Id.; see also Dodrill v. Shalala, 12 F.3d 915, 918 (9th Cir. 1993). Unless
24 affirmative evidence shows the claimant is malingering, the ALJ’s reasons for rejecting the
25 claimant’s testimony must be “clear and convincing.” Lester, 81 F.2d at 834. The evidence as a

1 whole must support a finding of malingering. See O'Donnell v. Barnhart, 318 F.3d 811, 818 (8th
2 Cir. 2003).

3 In determining a claimant's credibility, the ALJ may consider "ordinary techniques of
4 credibility evaluation," such as reputation for lying, prior inconsistent statements concerning
5 symptoms, and other testimony that "appears less than candid." Smolen v. Chater, 80 F.3d 1273,
6 1284 (9th Cir. 1996). The ALJ also may consider a claimant's work record and observations of
7 physicians and other third parties regarding the nature, onset, duration, and frequency of
8 symptoms. See id.

10 Plaintiff argues that in making the above findings, the ALJ improperly rejected both the
11 objective medical evidence in the record and plaintiff's own testimony that was inconsistent with
12 the sitting, standing, walking, lifting and carrying capabilities reflected in the residual functional
13 capacity to perform light work. The undersigned agrees. First, the only reason the ALJ gave for
14 finding plaintiff not credible in regard to his subjective complaints – particularly in regard to his
15 alleged inability to sit, stand or walk for more than 10 minutes – was that they were inconsistent
16 with the medical evidence in the record. See Tr. 15. But while it may be, as discussed in greater
17 detail below, that the ALJ is ultimately correct as to the ability to sit, stand and/or walk, he could
18 not reject plaintiff's complaints solely because they were "not supported by objective medical
19 evidence." Orteza v. Shalala, 50 F.3d 748, 749-50 (9th Cir. 1995) (quoting Bunnell v. Sullivan,
20 947 F.2d 341, 346-47 (9th Cir.1991) (*en banc*)) (emphasis added).

23 Second, as plaintiff points out, there are a number of medical opinions in the record that
24 call into question the ALJ's light work RFC assessment, which the ALJ either did not properly
25 evaluate or did not in fact address in his decision. For example, in early November 2004, Terry
26 Mallory, A.R.N.P., one of plaintiff's treatment providers, reported that "[b]ecause of his residual

1 pain his ability to sit [was] limited to one and a half hours max[imum],” and then went on to state
2 that he needed “to be allowed to go to school at a slower pace, i.e., one five hour class a quarter
3 ideally.” Tr. 280. As noted above, however, the ALJ assessed plaintiff with a residual functional
4 capacity to perform light work as defined in 20. C.F.R. § 404.1567(b), which defines that level of
5 work as follows:

6
7 Light work involves lifting no more than 20 pounds at a time with frequent
8 lifting or carrying of objects weighing up to 10 pounds. Even though the
9 weight lifted may be very little, a job is in this category when it requires a
10 good deal of walking or standing, or when it involves sitting most of the time
11 with some pushing and pulling of arm or leg controls. To be considered
12 capable of performing a full or wide range of light work, you must have the
ability to do substantially all of these activities. If someone can do light work,
we determine that he or she can also do sedentary work, unless there are
additional limiting factors such as loss of fine dexterity or inability to sit for
long periods of time.

13 20 C.F.R. § 404.1567(b) (emphasis added); see also Social Security Ruling (“SSR”) 83-10 (full
14 range of light work requires standing or walking, off and on, for total of approximately 6 hours
15 of 8-hour workday).³ Accordingly, the limitations on the length of time plaintiff can sit or attend
16 class, if adopted, could potentially limit his ability to perform light work. Since the ALJ did not
17 explain what weight if any he was giving this evidence,⁴ and it constitutes significant probative
18 evidence of plaintiff’s ability to perform such work at least in terms of sitting ability,⁵ the Court
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21 ³ Plaintiff asserts defendant’s definition of light work also requires the ability to sit or stand for two hours and up to
22 six hours in an eight-hour workday. However, plaintiff provides no legal citation for such a requirement. Indeed, as
23 noted above, the only requirement in terms of standing and walking is that the individual be able to perform “a good
24 deal” of it, or “off and on, for a total of approximately 6 hours,” with no further clarification provided for the phrase
“off and on.” Id. (emphasis added). Nor is there any specific time requirement for sitting, other than that the person
must be able to perform it “most of the time.” Id.

25 ⁴ See 20 C.F.R. § 404.1513(d) (providing that evidence provided by medical sources other than licensed physicians
or psychologists, such as nurse practitioners, may be used to establish severity of claimant’s impairments and their
effect on his or her ability to work); see also SSR 06-03p (“[o]pinions from these medical sources . . . are important
26 and should be evaluated on key issues such as impairment severity and functional effects.”).

⁵ In regard to sitting and the definition of light work under 20 C.F.R. § 404.1567(b), there is medical evidence in the
record that plaintiff is at least somewhat limited in terms of pushing and pulling of leg controls (see Tr. 307), albeit
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1 is unable to determine whether he in fact properly evaluated it.

2 Plaintiff also argues the ALJ improperly evaluated the functional assessment provided by
3 Dr. Brion. Although the ALJ found the fact that Dr. Brion “suggested” plaintiff “could attend a
4 [cooperative school work] program for 30 hours a week” indicated he thought plaintiff could “sit
5 long enough to participate in [that] program,” Dr. Brion also indicated he believed that plaintiff
6 would need to “change positions frequently.” Tr. 15, 268. The ALJ, however, did not address
7 this latter limitation, nor did he appear to account for it in the residual functional capacity with
8 which he assessed plaintiff. Certainly, such a limitation could potentially limit the range of light
9 work plaintiff is able to perform.⁶

11 The ALJ’s implied finding that the interest plaintiff had indicated he had in training as a
12 nuclear medical technician suggested an ability to perform a job that requires an ability to stand
13 and walk for more than 10 minutes at a time also is problematic. While plaintiff did express his
14 interest in such work to Dr. Brion in early May 2005, if funding for retraining could be obtained
15 (see Tr. 261), the Court agrees with plaintiff that a mere desire to return to work – even to work
16 in a job that falls in the light category – does not necessarily equate with an ability to perform
17 such work, although it may be indicative of a subjective belief in the ability to do so, assuming
18 plaintiff was aware of all of the physical requirements of that work. As such, this too was not a
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21 not with respect to pushing and pulling of arm controls. See 316-17, 361. In addition, the limitation on pushing and
pulling of leg controls appears to be the minority view. See id.

22 ⁶ Plaintiff also points to a comment made by Dr. Brion in early December 2004, in which he stated he asked plaintiff
23 “to withdraw his enrollment [from college] for January so” that they could “concentrate on his rehab[ilitation].” Tr.
24 267. But the Court does not find the ALJ necessarily erred in failing to mention this comment, given that Dr. Brion
went on to state that he expected plaintiff “to do well in the next 3 months” and that he could “enroll for the spring
25 quarter.” Id.; see also Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (claimant has burden of proving he or
she suffers from medically determinable impairment that can be expected to result in death or that has lasted or can
26 be expected to last for continuous period of not less than twelve months). The same is true in regard to Dr. Blair’s
indication in early December 2005, that plaintiff was not yet released to work (see Tr. 355) – given that he stated in
late October 2005, that plaintiff was “off work” only until January 1, 2006 (Tr. 344) – and to Dr. Blair’s statements
in late August 2006, late September 2006, and mid-October 2006, that he “should be considered to be off work
until” October 1, 2006, November 1, 2006, and January 1, 2007, respectively. (Tr. 334-336).

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valid basis for finding plaintiff to be capable of performing light work.⁷

Plaintiff next argues the ALJ erred in rejecting his claim that he could only sit, stand and walk for 10 minutes at a time on the basis of the estimate of physical capacity form completed by Dr. Blair in late July 2005. Again, the Court agrees with plaintiff that while that form does show Dr. Blair believed plaintiff would be able to perform each task for three to six hours in an eight-hour workday, it provided no opinion or assessment as to plaintiff's ability to perform each such task at one time. See Tr. 364. Accordingly, while the ALJ may be correct that this form indicates plaintiff is capable of performing "a range of light work," it does not necessarily show that he is able to perform it at the level found by the ALJ. Tr. 14-15.

In addition, plaintiff argues the ALJ erred in failing to consider Dr. Blair's late September 2006 estimate of physical capacities form, in which he opined that plaintiff could sit, stand and walk each for one hour at a time, and could perform each such activity for a total of five hours in an eight-hour workday. See Tr. 360. While this estimate does call into question plaintiff's claim that he could sit, stand and walk for only 10 minutes at a time, it is not clear that it would permit the full range of light work in terms of these tasks as found by the ALJ. Once more, because the ALJ did not provide any analysis of Dr. Blair's assessment, the Court is unable to determine if he properly rejected it or even considered it at all in determining plaintiff's RFC. The same is true with respect to the physical capacity evaluation summary Dr. Blair provided in October 2006, in which he agreed with a physical therapist's determination that plaintiff:

- Could perform within the "LIGHT range in an 8 hour day on a full-time basis";

⁷ In addition, the mere fact that plaintiff has "participated in vocational training geared at training him for sedentary work" (Tr. 15 (emphasis added)), does not necessarily indicate or suggest he can sit more than 10 minutes at a time, let alone for the length of time that may be required of him given the ALJ's assessment of his RFC. Nor did the ALJ point to any evidence in the record that plaintiff actually successfully completed such training, or that such training would allow him to in fact transfer to an actual work setting.

- 1 • Sit, stand and walk each for “up to 20 minutes at a time without restriction”;
- 2 • Sit, stand and walk each for “up to 2.5 hours in an 8 hour day”; and
- 3 • “Alternatively sit/stand/walk for 2 hours at a time; 8 hours in an 8 hour day.”

4 Tr. 307 (emphasis in original). Again, although these findings do appear to contradict plaintiff’s
5 alleged limitations regarding sitting, standing and walking at one time, it is not entirely clear they
6 support the level of ability to perform light work found by the ALJ.

7
8 Plaintiff further takes issue with the ALJ’s reliance on Dr. Settle’s opinion in early April
9 2007, that he could perform light work and the job of accounting clerk. See Tr. 15. Specifically,
10 plaintiff asserts the ALJ could not do so, because there is no indication in the form completed by
11 Dr. Settle, as what he could do in regard to the ability to sit, stand and walk. The Court does find
12 that because of this absence (see Tr. 133-34), it is not at all clear plaintiff is able to perform light
13 work as found by the ALJ. For the same reason, though, because Dr. Settle also did not indicate
14 what the restrictions were in checking a box on that form indicating plaintiff was not released to
15 work without restrictions (see Tr. 134), this does not necessarily contradict the ALJ’s findings, as
16 Dr. Settle could merely mean thereby that plaintiff was restricted to light work.

17
18 Plaintiff argues as well that the ALJ’s reliance on the accounting clerk certification is not
19 valid, as the record shows Dr. Settle indicated plaintiff could not sit for prolonged periods. The
20 Court finds that this does at least call into some question Dr. Settle’s certification here, since Dr.
21 Settle did opine in late March 2007, that “[p]rolonged sitting, especially in a vibrating car, will
22 likely aggravate is back pain and probably cause a flare-up which potentially could interfere with
23 his ability to complete” his school program. Tr. 494. Given that the job of accounting clerk was
24 defined as being sedentary in nature, it is unclear whether Dr. Settle really believed plaintiff was
25 capable of performing it, particularly in light of the fact that he qualified his certification for that
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1 job by stating plaintiff would “need permanent ergonomic modification” to do so. Tr. 144. Thus,
2 here too the ALJ erred.

3 Lastly, plaintiff argues the ALJ erred in concluding he could perform light work, because
4 light work, as noted above, also requires the ability to lift “no more than 20 pounds at a time with
5 frequent lifting or carrying of objects weighing up to 10 pounds,” whereas the record contains a
6 number of medical source opinions indicating plaintiff cannot do this. For example, in regard to
7 Dr. Settle’s early April 2007 light work opinion, the form he completed defined light work to
8 mean working with less than and up to 20 pounds of weight occasionally and less than and up to
9 10 pounds of weight frequently. See Tr. 134; see also Tr. 677. Other medical source opinions
10 also appear to limit plaintiff to lifting and/or carrying less than what the ability to perform light
11 work would require. See Tr. 307, 311, 361, 364; but see Tr. 308, 316. This provides additional
12 evidence, therefore, that the ALJ’s RFC assessment is not fully supported.
13

14 II. The ALJ’s Findings at Step Five

15 If a claimant cannot perform his or her past relevant work, at step five of the disability
16 evaluation process the ALJ must show there are a significant number of jobs in the national
17 economy the claimant is able to do. See Tackett v. Apfel, 180 F.3d 1094, 1098-99 (9th Cir.
18 1999); 20 C.F.R. § 404.1520(d), (e). The ALJ can do this through the testimony of a vocational
19 expert or by reference to defendant’s Medical-Vocational Guidelines. Tackett, 180 F.3d at 1100-
20 1101; Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2000).
21

22 An ALJ’s findings will be upheld if the weight of the medical evidence supports the
23 hypothetical posed by the ALJ. See Martinez v. Heckler, 807 F.2d 771, 774 (9th Cir. 1987);
24 Gallant v. Heckler, 753 F.2d 1450, 1456 (9th Cir. 1984). The vocational expert’s testimony
25 therefore must be reliable in light of the medical evidence to qualify as substantial evidence. See
26

1 Embrey v. Bowen, 849 F.2d 418, 422 (9th Cir. 1988). Accordingly, the ALJ's description of the
2 claimant's disability "must be accurate, detailed, and supported by the medical record." Id.
3 (citations omitted). The ALJ, however, may omit from that description those limitations he or
4 she finds do not exist. See Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001).

5 At the hearing, the ALJ posed a hypothetical question to the vocational expert containing
6 substantially the same limitations as were included in the ALJ's RFC assessment. See Tr. 36. In
7 response thereto, the vocational expert testified that an individual with those limitations, and who
8 had the same age, education and work background as plaintiff, was capable of performing other
9 jobs. See Tr. 35-37. Based on the above RFC assessment and the vocational expert's testimony,
10 the ALJ found plaintiff to be capable of performing other jobs existing in significant numbers in
11 the national economy. See Tr. 16-17.

12 Plaintiff argues the ALJ's step five determination here is not supported by the substantial
13 evidence in the record, in light of the ALJ's errors in evaluating the objective medical evidence
14 and in assessing his residual functional capacity. The Court agrees. As discussed above, there is
15 a fair amount of objective medical evidence in the record that plaintiff is not able to perform the
16 range of light work determined by the ALJ. Two of the jobs identified by the vocational expert
17 and adopted by the ALJ, furthermore, would appear to require the ability to perform work in that
18 range. See Tr. 17, 36-37; see also Dictionary of Occupational Titles ("DOT") 706.684-022, 1991
19 WL 679050, and 211.462-010, 1991 WL 671840. Accordingly, it is not at all clear that plaintiff
20 would be able to perform either of these two jobs given the ALJ's errors.

21 Although the third job identified by the vocational expert would appear to be performed
22 at the sedentary level (see DOT 739.687-182, 1991 WL 680217), as pointed out by plaintiff it is
23 an unskilled job, and such jobs "are particularly structured so that a person cannot ordinarily sit
24

1 or stand at will.”⁸ SSR 83-12, 1983 WL 31253 *4. Again, as discussed above, there is at least
 2 some medical evidence in the record indicating a need to change positions frequently, equating
 3 potentially to the need for a “sit or stand at will” option. On this basis, therefore, it also is not at
 4 all clear that plaintiff could perform this third job.

5 III. This Matter Should Be Remanded for Further Administrative Proceedings

6 The Court may remand this case “either for additional evidence and findings or to award
 7 benefits.” Smolen, 80 F.3d at 1292. Generally, when the Court reverses an ALJ’s decision, “the
 8 proper course, except in rare circumstances, is to remand to the agency for additional
 9 investigation or explanation.” Benecke v. Barnhart, 379 F.3d 587, 595 (9th Cir. 2004) (citations
 10 omitted). Thus, it is “the unusual case in which it is clear from the record that the claimant is
 11 unable to perform gainful employment in the national economy,” that “remand for an immediate
 12 award of benefits is appropriate.” Id.

13 Benefits may be awarded where “the record has been fully developed” and “further
 14 administrative proceedings would serve no useful purpose.” Smolen, 80 F.3d at 1292; Holohan
 15 v. Massanari, 246 F.3d 1195, 1210 (9th Cir. 2001). Specifically, benefits should be awarded
 16 where:

17 (1) the ALJ has failed to provide legally sufficient reasons for rejecting [the
 18 claimant’s] evidence, (2) there are no outstanding issues that must be resolved
 19 before a determination of disability can be made, and (3) it is clear from the
 20 record that the ALJ would be required to find the claimant disabled were such
 21 evidence credited.

22 Smolen, 80 F.3d 1273 at 1292; McCartey v. Massanari, 298 F.3d 1072, 1076-77 (9th Cir. 2002).

23
 24 ⁸ The job of table worker described in DOT 739.687-182 is defined as requiring a “specific vocational preparation”
 25 or “SVP” of 2 (“Anything beyond short demonstration up to and including 1 month.”). 1991 WL 680217. An SVP
 26 of 2 corresponds to unskilled work. See SSR 00-4p, 2000 WL 1898704 *3. As the other two jobs identified by the
 vocational expert are defined by the DOT as requiring an SVP of 2, and therefore are considered to be unskilled jobs
 as well (see DOT 706.684-022 (small products assembler I), 1991 WL 679050, and DOT 211.462-010 (cashier II),
 1991 WL 671840), a need to change positions frequently, or sit or stand at will, would appear to preclude these jobs
 on this basis as well.

1 Because issues still remain with respect to the medical evidence in the record, plaintiff's residual
2 functional capacity and her ability to perform other jobs existing in significant numbers in the
3 national economy, this matter should be remanded to defendant to conduct further administrative
4 proceedings.

5
6 CONCLUSION

7 Based on the foregoing discussion, the Court should find the ALJ improperly concluded
8 plaintiff was not disabled. Accordingly, the Court also should reverse the ALJ's decision and
9 remand this matter to defendant to conduct further administrative proceedings in accordance with
10 the findings contained herein.

11 Pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure ("Fed. R. Civ. P.")
12 72(b), the parties shall have **fourteen (14) days** from service of this Report and
13 Recommendation to file written objections thereto. See also Fed. R. Civ. P. 6. Failure to file
14 objections will result in a waiver of those objections for purposes of appeal. See Thomas v. Arn,
15 474 U.S. 140 (1985). Accommodating the time limit imposed by Fed. R. Civ. P. 72(b), the clerk
16 is directed set this matter for consideration on **April 1, 2011**, as noted in the caption.

17
18 DATED this 14th day of March, 2011.

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21 
22 Karen L. Strombom
23 United States Magistrate Judge
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